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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DARRYL EDWARD BROWN, Defendant and Appellant.	G054855 (Super. Ct. No. 94NF2864) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Alana Butler, Laura Baggett and Craig Russell, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Darryl Edward Brown appeals from the denial of his petition for resentencing pursuant to Proposition 36. He contends there was insufficient evidence to support the trial court's finding beyond a reasonable doubt that he was ineligible for resentencing relief due to a prior forcible rape conviction. We affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Brown's Rape Conviction*

The evidence relating to Brown's rape conviction was set forth in our prior opinion as follows.

"In a second amended information in September 1996, the prosecutor charged Brown with methamphetamine possession, a felony at that time (former Health & Saf. Code, § 11377, subd. (a)), and alleged Brown suffered seven prior strike convictions. As pertinent here, the information alleged Brown 'was previously convicted of a violent/serious felony offense, a violation of [s]ection 261 of the California Penal Code (Rape of Judy [B.]), in the Superior Court of the County of Alameda, State of California, on and about the 19th day of December, 1974, case # 58194.' A jury found Brown guilty on the possession count and, in a bifurcated proceeding, the trial court entered a true finding on four of the prior strike convictions.

"Brown's probation officer prepared a report for the sentencing hearing, and in the report recounted Brown's prior offenses in a lengthy 'rap sheet' obtained from the California Bureau of Criminal Identification and Information. The first entry the probation officer listed on Brown's lengthy adult record included a count for '261 PC (Rape)' charged in 1974, and listed the disposition for that offense as '261.3 PC (Rape By Force), sentenced [to] 6-months-to-life.' At the sentencing hearing, the trial court imposed a sentence of 25 years to life under the Three Strikes law.

"Brown appealed, and a panel of this court affirmed his sentence in an unpublished opinion. A footnote in the opinion noted 'rape' among Brown's 'prior strike

convictions,' in addition to assault with a deadly weapon, robbery, and first degree burglary." (*People v. Brown* (Dec. 29, 2015, G05211) [nonpub. opn.].)

B. *Brown's Ineligibility for Resentencing Relief Pursuant to Proposition 47*

In February 2015, Brown filed a petition in the trial court under Proposition 47 to recall his sentence and redesignate his felony methamphetamine conviction as a misdemeanor. The court denied the petition on the ground that "[d]ue to criminal records defendant is not suitable under Prop[osition] 47." Specifically, the trial court concluded that Brown had suffered a prior conviction for forcible rape, and the forcible rape conviction rendered him ineligible for relief under Proposition 47. This court affirmed "the trial court's order because substantial evidence support[ed] it." (See *People v. Brown* (Dec. 29, 2016, G052221) [nonpub. opn.].) We concluded that "the probation report alone supports the trial court's ruling." (*Ibid*.)

C. *Brown's Petition for Resentencing Relief Pursuant to Proposition 36*

Brown also filed a petition for resentencing under Penal Code section 1170.126. (All statutory references are to the Penal Code unless otherwise designated.) The District Attorney opposed the petition, arguing that Brown was ineligible for relief because he had suffered a conviction for forcible rape. In support, the prosecutor cited this court's prior opinion and the probation report referenced in our opinion. The prosecutor also submitted a certified California Law Enforcement Telecommunications System (CLETS) rap sheet, which the prosecutor asserted "is the same rap sheet that was relied upon in the probation and sentencing report." The CLETS rap sheet showed Brown was convicted of "261.3 PC-Rape By Force."

The trial court concluded Brown was ineligible for resentencing relief. It found beyond a reasonable doubt that Brown had suffered a prior conviction for forcible rape, and ruled that the "conviction makes him ineligible for consideration under Prop[osition] 36." The court's finding was based on this court's prior opinion, the certified rap sheet – which the court found "comport[ed] with the Evidence Code" – and

"the probation report, and it says on page 6 there was a disposition in Alameda Superior Court Case 58194, that [] Brown was convicted of rape by force."

II

DISCUSSION

In November 2012, California voters approved Proposition 36, which revised the Three Strikes law to reduce the punishment prescribed for certain third strike defendants. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C); *People v. Conley* (2016) 63 Cal.4th 646, 651.) Proposition 36 also authorized defendants presently serving third strike sentences to seek resentencing under the amended penalty scheme by filing a petition to recall the sentence. (§ 1170.126, subd. (b).) However, a defendant is ineligible for resentencing relief if he or she previously suffered, among other prior convictions, a conviction for a "'sexually violent offense,'" as defined by subdivision (b) of Section 6600 of the Welfare and Institutions Code. (See 1170.12, subd. (c)(2)(C)(iv)(I).) Under Welfare and Institutions Code section 660, a sexually violent offense includes rape (§ 261) "when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person." (Welf. & Inst. Code, § 6600, subd. (b).)

As we noted in our prior opinion, a conviction for forcible rape also renders a defendant ineligible for resentencing relief under Proposition 47. (See *People v. Brown* (Dec. 29, 2016, G052221) [nonpub. opn.]; see also *People v. Sledge* (2017) 7 Cal.App.5th 1089, 1101 (*Sledge*) [defendant's juvenile adjudication for forcible rape is a disqualifying prior conviction under section 1170.18, subd. (i).) We also concluded the probation report alone was sufficient to support the trial court's finding that Brown had suffered a prior conviction for forcible rape. Accordingly, if admissible in a Proposition 36 proceeding, the probation report would suffice to support the trial court's eligibility determination here.

The California Supreme Court has never addressed "what sources a court may consider when making an eligibility determination" under Proposition 36. (*People v. Estrada* (2017) 3 Cal.5th 661, 676, fn. 7.) However, our high court has not overruled *People v. Bradford* (2014) 227 Cal.App.4th 1322 (*Bradford*), which held that the trial court was limited to the "record of conviction," as the term was used in *People v. Woodell* (1998) 17 Cal.4th 448 (*Woodell*). (See *Bradford*, *supra*, 227 Cal.App.4th at p. 1337-1339.) In ruling that the trial court was limited to the record of conviction, the *Bradford* court acknowledged that *Woodell* involved the "parameters under which a prior conviction may be proved as an enhancement" in a pending criminal case whereas the instant matter concerns "a threshold eligibility determination" in "a unique postconviction proceeding." (*Bradford*, supra, 227 Cal.App.4th at pp. 1337-1338, 1340.) Despite this important distinction, the holding in *Bradford* has been applied consistently in subsequent Proposition 36 cases. Accordingly, we will apply *Bradford* to determine whether the probation report is admissible in a Proposition 36 proceeding.

In *Woodell*, the high court explained that it has "never defined exactly what comprises the record of conviction." Nevertheless, it stated that the record of conviction included "the trial court record" and "appellate court record, including the appellate opinion." (*Woodell, supra,* 17 Cal.4th at p. 456.) Here, the probation report was part of the trial court record, part of the appellate record in the direct appeal, and summarized in our prior appellate opinions. (Cf. *Sledge*, *supra*, 7 Cal.App.5th at p. 1096 ["The probation report is part of the superior court record, and it is also part of the appellate court record in *Sledge I* and *Sledge II*."].) Accordingly, under *Woodell*, the probation report is part of the record of conviction.

Citing *People v. Trujillo* (2006) 40 Cal.4th 165 (*Trujillo*), Brown contends probation reports are not part of the record of conviction. In *Trujillo*, as part of a plea bargain, the defendant pleaded guilty to the offense of inflicting corporal injury, but the allegation that he personally used a deadly weapon in committing the offense was

stricken. "A probation report prepared prior to sentencing reflects that defendant was interviewed on September 16, 1991, and admitted stabbing the victim with a knife during an argument." (*Trujillo, supra,* 40 Cal.4th at p. 170.) In a subsequent criminal matter, the trial court declined to find the prior conviction was a strike because there was no admissible evidence the defendant personally used a dangerous or deadly weapon. The District Attorney appealed, arguing the defendant's admission as recounted in the probation report constituted substantial evidence the defendant had used a knife. (*Id*. at pp. 172-173.) The high court affirmed the trial court's ruling, concluding that "a defendant's statements, made after a defendant's plea of guilty has been accepted, that appear in a probation officer's report prepared after the guilty plea has been accepted are not part of the record of the prior conviction, because such statements do not 'reflect[ ] the facts of the offense for which the defendant was convicted.' [Citation.]" (*Id.* at p. 179.) The high court contrasted a defendant's postplea admissions with his or her statements in a preliminary hearing, which are admissible to prove the nature of a prior conviction. The court explained: "The transcript of a preliminary hearing contains evidence that was admitted against the defendant and was available to the prosecution prior to the conviction. The transcript of a preliminary hearing, therefore, sheds light on the basis for the conviction." (*Id.* at p. 180.)

Here, the prosecution was not attempting to prove an enhancement allegation to increase Brown's sentence. Rather, Brown was seeking leniency from the court to reduce his sentence. More important, the trial court did not rely on Brown's postplea statements. Rather, the statements summarized Brown's criminal history. This information was available to the prosecution and the defense before the conviction; it therefore "sheds light on the basis for the conviction." (*Trujillo, supra*, 40 Cal.4th at p. 180.) In sum, *Trujillo* does not mandate the exclusion of information about Brown's criminal history in the probation report. Accordingly, the trial court could rely on the probation report to find beyond a reasonable doubt that Brown had suffered a prior

conviction for forcible rape, and therefore was ineligible for resentencing relief under Proposition 36.

III

DISPOSITION

The trial court's postjudgment order denying Brown's petition is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.